Employer Considerations Related to Health and Safety of Workers during Covid-19 Outbreak

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Roughly three in four Americans currently face some form of a "stay-at-home" order restricting personal movement and the normal operation of business. However, numerous companies remain open for business, whether deemed "essential," through new remote and telework arrangements, or in the absence of a stay-at-home order. Many of their employees continue to report to workplaces across the country, helping, for instance, to keep the stores open, the lights running, and others safe.

Many employers have questions about navigating employees' health and safety concerns, including **(1) how to address employees who are reluctant to come to work because of fear of infection** and **(2) whether employers may face liability if employees who come to work get sick**. Below, we address these questions and note legal and practical considerations as well as best practices recommendations for employers facing them.

In all events, employers who continue to operate an active workplace should think seriously about ways in which they can minimize workplace exposure to COVID-19 and help maintain the health and safety of their workforce. Most critically, employers should ensure that they are closely following guidance from the Centers for Disease Control and Prevention ("CDC"), Occupational Safety and Health Administration ("OSHA"), and local authorities concerning how best to prepare workplaces for the COVID-19 outbreak and reduce the risks of transmission. They should also regularly communicate with employees about the steps they are taking to foster a healthy work environment and be responsive to specific employee health or safety concerns.

WHAT IF AN EMPLOYEE REFUSES TO REPORT TO WORK DUE TO FEAR OF CONTRACTING COVID-19?

Amid increased community transmission and "stay-at-home" orders, employees may fear contracting the virus if they leave home and may refuse to report to a workplace as required. **Generally speaking, however, employees do not have the right to refuse to work due to health and safety concerns unless certain relatively stringent conditions are met.**

Under OSHA guidance, which applies to most private-sector employers, employees are entitled to refuse to work only if they believe in good faith that they are in "imminent danger." Specifically, a work refusal is protected only if: (1) where possible, the employee has asked the employer to eliminate the danger and the employer failed to do so; (2) s/he genuinely believes that an "imminent danger" exists; (3) a reasonable person would agree that there is a real danger of death or serious injury; and (4) regular enforcement channels are not sufficient. "Imminent danger" requires an "immediate or imminent" "threat of death or serious physical harm" or "a reasonable expectation that toxic substances or other health hazards are present and exposure to them will shorten life or cause substantial reduction in physical or mental efficiency."

This inquiry is fact- and context-specific, turning on the nature and imminence of the danger under the circumstances and the reasonableness of the employee's belief. As a result, many workplaces taking precautionary measures against the spread of COVID-19 are unlikely to meet the elements required for an employee to refuse to work, and an employee's blanket refusal to come to work due to a general fear of contracting COVID-19, without more, will in many contexts be unlikely to meet the OSHA standard. Depending on the nature of the work and the workplace, however, there may be some contexts in which employee concerns about COVID infection are more likely to meet the OSHA standard. If an employee refuses to work due to unfounded health and safety concerns, the employee may be subject to discipline, including termination.

However, employers should tread carefully, because they could face an action for retaliation for taking disciplinary action against an employee who refuses to work due to health and safety concerns. In particular:

- **OSHA**. OSHA prohibits retaliation against employees refusing to perform work under the conditions described above. There is no private right of action for such retaliation claims, however; rather, employees must file a complaint within thirty days with OSHA, which can then bring an enforcement action.

- **National Labor Relations Act ("NLRA")**. The NLRA protects against employer retaliation for work refusals regarding unsafe work if the work refusal is made by a non-supervisor employee in good faith and is "concerted," i.e., made by two or more employees acting "in concert," reasonably directed at enforcing a right under a collective bargaining agreement, or made with or on the authority of other employees. (For union employees, the right to refuse work is waived by a contractual no-strike clause unless there is objective evidence of "abnormally dangerous conditions" for the particular workplace). An employee may file a charge with the NLRB concerning the retaliation within 6 months. Notably, this protection is broader than under OSHA in that it does not require the refusal to be objectively reasonable. It is also narrower than OSHA insofar as it protects only "concerted activity."

- **State Laws**. Some states may provide additional protections for employees refusing to work due to safety concerns. For instance, in California, Cal/OSHA protects an employee's right to refuse work that would violate a Cal/OSHA health or safety regulation where the violation would create a "real and apparent hazard" to employees. And in New York, Section 740(2) of the Labor Law provides a cause of action for whistleblowers who refuse to participate in an activity in violation of law, rule or regulation, "which violation creates and presents a substantial and specific danger to the public health or safety."

As a practical matter, **employers should take all reasonable steps available to help ensure the safety of employees under the circumstances**, in particular by following all federal, state, and local orders governing permitted operation of business and all federal, state, and local guidance concerning best practices for personal and workplace safety during the COVID-19 outbreak. They should communicate those measures to employees regularly to make sure employees know about the steps taken and can potentially provide input or raise specific concerns. If all available steps are taken to help ensure safety and employees still refuse to come to work, an employer can consider discipline. But employers will want to consider these potential legal risks as well as the broader consequences of such discipline on the workplace, such as effects on company morale and permanently losing trained or valuable workers.

When faced with employee refusal to work due to COVID-19 fears, employers should also **remember their obligations under the ADA to reasonably accommodate employees** who have disabilities that put them at greater risk if they contract COVID-19. Employers should not ask an employee to disclose an underlying condition; however, employees with underlying medical conditions or disabilities may request accommodation under the ADA. If requested, employers may seek to verify the disability and that an accommodation is needed, and they should consider whether a reasonable accommodation can be reached or whether such accommodation would pose

an undue hardship to the business under the current circumstances. Currently, an employer is not obligated to provide reasonable accommodation if the employee lives in the same household as someone at greater risk due to a disability, but the employer should ensure it is treating all similarly situated employees similarly.

WHAT IF AN EMPLOYEE CONTRACTS COVID-19 WHILE CONTINUING TO WORK? WHAT POTENTIAL LIABILITIES DOES AN EMPLOYER FACE?

If an employee who is continuing to work in the workplace contracts COVID-19, employers should first and foremost **take steps to protect the employee, other employees, and the workplace**. The employee should be instructed to stay home while sick, until the CDC's criteria for discontinuing home isolation are met. Employers should notify relevant co-workers of possible exposure to COVID-19 in the workplace, while maintaining the confidentiality of employees' medical information, including the medical status and identities of diagnosed employees. Employers should also follow CDC disinfecting and cleaning recommendations, and should consider whether additional cleaning or protective measures for the workplace are appropriate.

Should an employee contract COVID-19, it is possible that employers may face actions or claims for liability alleging that the employee contracted the virus in the workplace due to the employer's failure to maintain a safe work environment. These actions may take a number of forms, including enforcement actions by OSHA, claims for workers' compensation, or civil actions for negligence.

Below, we briefly discuss those potential sources of liability as well as ways to mitigate them. Ultimately, the advice remains the same: **employers should make sure they are following applicable health guidance, abiding by relevant laws and orders, and taking steps to enhance workplace safety and address related employee concerns**. Employers who can show that they acted in good faith to reduce the risk of transmission and protect workers' health will be best positioned to weather any legal action even in the face of bad outcomes.

OSHA

Although there is no specific OSHA standard governing COVID-19, OSHA generally requires employers to provide employees with a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." Additional OSHA standards, such as those governing PPE or Bloodborne Pathogens, may apply in certain workplaces. Violations of OSHA, including of this "general duty" clause, are subject to enforcement actions and civil penalties, including

additional fines for willful or repeated violations. Willful violations resulting in death can also give rise to criminal liability.

Employers should thus closely follow and take steps to ensure compliance with relevant OSHA standards and guidance. In particular, employers should follow OSHA's Guidance on Preparing Workplaces for COVID-19 and keep abreast of updates to OSHA and CDC guidance for businesses. Employers should also follow OSHA recordkeeping and reporting requirements as appropriate for work-related cases of COVID-19.

Workers' Compensation

Workers' compensation claims and procedures vary from state to state. Generally, however, workers' compensation laws require an employee to prove (1) that s/he contracted the illness/disease in the course and scope of his/her employment and (2) that the illness/disease was caused by conditions peculiar to his/her employment. Workers' compensation laws generally do not cover "the ordinary diseases of life," and some states specifically exclude from coverage contagious diseases resulting from exposure to fellow employees or to which the employee would have been equally exposed outside of employment.

Although workers' compensation claims are fact-specific and determined on a case-by-case basis, it seems likely that many employees will be unable to claim workers' compensation for contracting COVID-19. Employees in many types of workplaces will likely struggle to establish that contracting the virus was a risk peculiar to their employment rather than a risk borne by the public generally, and/or that COVID-19 is not an "ordinary disease of life." Employees may also have difficulty establishing that they contracted the virus in the course of their employment rather than in another setting.

Those circumstances and the availability of workers' compensation may be different for certain types of workers, however, such as healthcare workers and first responders, who face increased risk as a result of their occupation. At least one state (Washington) will now permit workers' compensation protection for these types of workers who contract COVID-19.

Employers should again make sure they are taking all reasonable steps to prevent transmission in the workplace, thus decreasing the likelihood that an employee contracted the virus at work and that the risk of contracting the virus would be seen as peculiar to the employment.

Negligence

Where workers' compensation applies, it typically provides the exclusive remedy for the workplace harm, subject to limited exceptions, such as intentional or willful conduct by the employer. Where workers' compensation does not apply, however, employees may bring civil actions for negligence. Generally speaking, to bring a claim for negligence, a plaintiff must show that the employer breached its duty of care and that such breach caused harm to the employee.

Although negligence actions are often preferred by plaintiffs, as they offer the prospect of greater recovery than in the workers' compensation system, negligence actions in the context of COVID-19 are likely to face a number of barriers.

First, it may be difficult, depending on the specific facts, to show negligence—breach of the duty of care—on the part of the employer. If an employer has taken reasonable responsive measures and is generally following OSHA/CDC guidance, it will have a strong basis to argue that it was not negligent in maintaining the workplace and should not face liability. Employers will also need to ensure that they are abiding by all statutes, regulations, and executive orders concerning COVID-19, as violation of any such authorities may give rise to a finding of negligence per se, under which a plaintiff can prove negligence by showing that a statute or regulation intended to promote public safety was violated and resulted in harm.

Second, employees may have difficulty establishing that the alleged negligence caused the employee to contract the virus. Given the widespread nature of the outbreak, there will likely be strong arguments that the employee contracted the virus in other settings or as a result of unavoidable transmission despite reasonable precautions.

Both negligence and causation analyses, however, are fact- and context-specific, and thus could require significant time and discovery to rebut. Again, as a practical matter, the best way to discourage the bringing of negligence claims, and to successfully defeat any such claims brought, is to have a clear and strong record of taking employees' health and safety seriously and following all applicable federal, state, and local guidance on the COVID-19 outbreak.

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For more information regarding the coronavirus, please visit our Coronavirus Resource Center.

Please do not hesitate to contact us with any questions.

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